

May 21, 1999

D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94-Phase 4-K

Consolidated Petitions of New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts, Teleport Communications Group, Inc., Brooks Fiber Communications of Massachusetts, Inc., AT&T Communications of New England, Inc., MCI Telecommunications Company, and Sprint Communications Company, L.P., pursuant to Section 252(b) of the Telecommunications Act of 1996, for arbitration of interconnection agreements between Bell Atlantic-Massachusetts and the aforementioned companies.

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TABLE OF CONTENTS

I. <u>INTRODUCTION</u>	Page 1
II. <u>STANDARD OF REVIEW</u>	Page 7
III. <u>BELL ATLANTIC PROPOSALS</u>	Page 10
IV. <u>AT&T PROPOSAL</u>	Page 12
A. <u>Description</u>	Page 12
B. <u>Evaluation of Technical Feasibility</u>	Page 14
V. <u>MCI PROPOSALS</u>	Page 16
VI. <u>EVALUATION OF BELL ATLANTIC'S PROPOSALS</u>	Page 17
A. <u>Virtual Collocation</u>	Page 18
B. <u>Enhanced Extended Loop</u>	Page 19
C. <u>Overall Evaluation</u>	Page 21
1. <u>Technical Feasibility; Ability to Enhance Competition</u>	Page 21
2. <u>Consistency with the Phase 4-E Order</u>	Page 22

I. INTRODUCTION

This arbitration proceeding is held pursuant to the Telecommunications Act of 1996, 47 U.S.C. § 252 ("Act"). The proceeding is a consolidated arbitration between New England Telephone and Telegraph Company d/b/a/ Bell Atlantic-Massachusetts ("Bell Atlantic," formerly "NYNEX"), the incumbent local exchange carrier ("ILEC"), and its competitors, AT&T Communications of New England ("AT&T"); Brooks WorldCom, Inc. ("Brooks"), formerly Brooks Fiber Communications of Massachusetts, Inc.; MCI WorldCom, Inc. ("MCI"), formerly MCI Telecommunications Corporation; Sprint Communications Company L.P. ("Sprint"); and Teleport Communications Group, Inc. ("TCG"). Consolidated Arbitrations, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94.⁽¹⁾

On March 13, 1998, the Department of Telecommunications and Energy ("Department") issued an Order in this proceeding concerning the provision of unbundled network elements ("UNEs")⁽²⁾ by Bell Atlantic to the competitive local exchange carriers ("CLECs"). Consolidated Arbitrations, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94-Phase 4-E (1998) ("Phase 4-E Order").⁽³⁾ The Department ruled that, in light of a 1997 decision by the United States Court of Appeals for the Eighth Circuit ("the Eighth Circuit Decision"),⁽⁴⁾ the Department would not require Bell Atlantic to combine UNEs on behalf of competing carriers in the manner prescribed by the FCC, but deemed by the Court to exceed FCC authority under the Act. Phase 4-E Order at 11.

However, we further found that Bell Atlantic's refusal to provide such combinations would impair the successful introduction of competition in Massachusetts, and, in particular, would "not advance our or the Act's policy to create efficiency-enhancing conditions that would allow local exchange competition to develop and to deliver price and service benefits to customers." Id. at 12-13. We expressed reservations as to whether Bell Atlantic's requirement that CLECs use collocation as the sole method to combine UNEs was consistent with the Act and the Eighth Circuit's findings. Id. at 13-14. We proposed that, unless Bell Atlantic could demonstrate that its collocation requirement was consistent with the Act and the Eighth Circuit's finding, it should develop an additional, alternative or supplemental method for provisioning UNEs in such a way that permitted recombination by competing carriers without imposing a facilities requirement on those carriers. Id. at 14. Finally, we noted that Bell Atlantic's refusal to provide UNEs in a manner consistent with the Eighth Circuit's rulings could raise a serious problem in the Department's review of any subsequent request by Bell Atlantic to offer inter-LATA long distance service under Section 271 of the Act. Id. at 13-15.

We directed the parties to return to negotiations on the issue of UNE provisioning and to report to the Department on the status of those negotiations. Id. at 16. The parties reported that negotiations had been unsuccessful, and the Department directed the parties to file their proposals for an arbitrated solution to the UNE-combinations issue. Bell Atlantic filed a proposal on April 17, 1998, in which it offered some revisions to its previous UNE combinations policy, and the CLECs responded to Bell Atlantic's proposals and offered some of their own. Evidentiary hearings were held on May 1, May 15, July 2, July 20, and September 10, 1998.⁽⁵⁾ Bell Atlantic presented as witnesses Paula L. Brown, vice president -- regulatory; Amy Stern, director of product management for unbundled wholesale elements; Don Albert, network services director of co-carrier implementation; and Bryan Kennedy, vice president of client services for CON-X Corporation. AT&T presented Robert V. Falcone, a division manager in AT&T's local services division. MCI presented Annette S. Guariglia, a regulatory analyst for public policy in MCI's local competition group. Sprint presented James O. Carlson, manager of regulatory policy and coordination.

The Arbitrator directed the parties to brief the following question: "Are Bell Atlantic's proposals with regard to UNE combinations consistent with the Department's March 13th Order, and are there alternative proposals which, while consistent with the Department's Order, might serve to better accomplish the goals of the Act?" (Tr. 34, at 172; Tr. 38, at 16-17). Parties were specifically asked not to reargue the issues that were decided in the Phase 4-E Order (Tr. 34, at 172-173). The Arbitrator also asked Bell Atlantic to address the question of whether it was willing to hold in abeyance its current policy of not combining UNEs pending the outcome of the Supreme Court's review of the Eighth Circuit Decision (Tr. 40, at 123). The Arbitrator further asked Bell Atlantic if it was willing to hold in abeyance its current policy until there had been a collaborative effort to evaluate fully the proposal offered by AT&T in this proceeding (Tr. 40, at 123-124). See Section VI.C., below. Briefs were filed by Bell Atlantic, AT&T, and MCI on September 28, 1998, and reply briefs were filed on October 8, 1998.

On January 25, 1999, the Supreme Court of the United States reversed the Eighth Circuit on several key points (see below). AT&T Corp. et al. v. Iowa Utilities Board et al., No. 97-826, slip op. (U.S. January 25, 1999) ("AT&T Corp."). On January 26, 1999, the Arbitrator in the instant matter asked the parties to submit comments on the implications of the Supreme Court's decision to the questions before him. Comments were filed on February 9, 1999 by Bell Atlantic, AT&T, MCI WorldCom, and Sprint, and reply comments were filed by Bell Atlantic, AT&T and MCI WorldCom on February 18, 1999.

The Supreme Court ruled on several issues germane to the present proceeding. First, it reversed the Eighth Circuit's ruling on the issue of already-combined UNEs, and concluded that the FCC did not err in establishing Rule 315(b), which prohibits an incumbent from separating already-combined network elements before leasing them to a competitor. AT&T Corp. at 25-28. See also, 47 C.F.R. § 51.315(b). As noted by the Court,

the rule the Commission has prescribed is entirely rational, finding its basis in Section 251(c)(3)'s nondiscrimination requirement. . . . It is true that Rule 315(b) could allow entrants access to an entire preassembled network. In the absence of Rule 315(b), however, incumbents could impose wasteful costs on even those carriers who requested less than the whole network. It is well within the bounds of the reasonable for the Commission to opt in favor of ensuring against an anticompetitive practice.

Id. at 27-28.

The Court also overruled the Eighth Circuit's ruling on the validity of Rule 319, which designated the range of UNEs to be provided to CLECs. Id. at 19-25.

We are of the view, however, that the FCC did not adequately consider the "necessary and impair" standards when it gave blanket access to these network elements, and others, in Rule 319. That rule requires an incumbent to provide requesting carriers with access to a minimum of seven network elements: the local loop, the network interface device, switching capability, interoffice transmission facilities, signaling networks and call-related databases, operations support systems functions, and operator services and directory assistance

The Commission's premise was wrong. Section 251(d)(2) does not authorize the Commission to create isolated exemptions from some underlying duty to make all network elements available. It requires the Commission to determine on a rational basis which network elements must be made available, taking into account the objectives of the Act and giving some substance to the "necessary" and "impair" requirements.

Id. at 20, 24. The Court vacated Rule 319 and remanded this section of the rules to the FCC for further consideration.

Third, the Court affirmed the FCC's authority to design a pricing method for UNEs. AT&T Corp. at 17. Fourth, the Supreme Court upheld the FCC's refusal to impose a facilities ownership requirement for access to UNEs. AT&T Corp. at 25.

On March 19, 1999, the Department issued an Order on the effect of the Supreme Court ruling on the UNE combinations portion of the Consolidated Arbitrations. Consolidated Arbitrations, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94 - Phase 4-J (1999) ("Phase 4-J Order"). The Department relied on commitments made by Bell Atlantic to the

FCC in its February 8, 1999 letter where it stated that it will continue to offer the UNEs contained in Rule 319 and in existing interconnection agreements.⁽⁶⁾ The Department noted that each of the Department-approved interconnection agreements between Bell Atlantic and the parties in this case includes a clear statement that Bell Atlantic will provide the full list of FCC-designated UNEs to the CLECs, and that these interconnection agreements also provide that Bell Atlantic will provide dark fiber, a UNE on which the FCC deferred to state action and one that this Department ordered Bell Atlantic to provide. Consolidated Arbitrations, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94 - Phase 3, at 49 (1996). The Department ordered, that Bell Atlantic, consistent with its February 8, 1999 representation to the FCC, make available the UNEs included in the Rule 319 UNE list and in existing interconnection agreements, to carriers with interconnection agreements and to carriers that seek that list during new negotiations. The Department also ruled that Bell Atlantic shall make existing combined UNEs, including the UNE platform, available to all CLECs in their combined form. Finally, because the interconnection agreements do not provide for a fee for maintaining an existing combination of UNEs (*i.e.*, a "glue charge"), the Department prohibited Bell Atlantic from assessing such a fee.

In this Order, the Department will address the issue of Bell Atlantic's provision of UNEs that are not already combined.

II. STANDARD OF REVIEW

Section 252(c) of the Act sets out the standards for arbitrations by state commissions. 47 U.S.C. § 252(c). Section 252(c) states, in relevant part, that a state commission shall

- (1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the [FCC] pursuant to section 251;
- (2) establish any rates for interconnection, services, or network elements according to [section 252(d).]

Therefore, any proposal for UNE provisioning must be consistent with Section 251, including the unbundled access rules of Section 251(c)(3), and the pricing rules of Section 252(d).

Section 251(c)(3) of the Act imposes an obligation on ILECs "to provide, to any requesting telecommunications carrier ... nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252."⁽⁷⁾ In addition, this section states that an ILEC "shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide

such telecommunications service." Furthermore, Section 252(d)(1) states that just and reasonable rates for the purposes of Section 251(c)(3) shall be nondiscriminatory.

In its Phase 4-E Order, the Department elaborated on the requirements for approval of any proposal regarding provisioning of UNEs. First, the Department stated that it will not order combinations of UNEs.⁽⁸⁾ Since the Phase 4-E Order, the Supreme Court reinstated the FCC's rule that prohibits an incumbent from separating already-combined network elements before leasing them to a competitor. However, the Supreme Court did not address the FCC's rules that required ILECs to combine "uncombined" network elements for competitors. See 47 C.F.R. § 51.315(c)-(f). The Eighth Circuit ruling vacating those rules was not on appeal, and those rules remain vacated. The basis for our Phase 4-E decision to decline to order mandated combinations for "uncombined" UNEs was not altered by the Supreme Court decision. Therefore, any CLEC proposal for UNE provisioning cannot involve mandated combinations of network elements that are not currently combined.

Second, in our Phase 4-E Order, the Department stated that "[b]ased on the record, it is clear that collocation requires a competing carrier to own a portion of a telecommunications network, so making collocation a precondition for obtaining UNEs appears to be at odds with the Eighth Circuit's findings." Id. at 13-14. We stated that Bell Atlantic must develop an additional, alternative or supplemental method for provisioning UNEs in such a way that they can be recombined by competing carriers without imposing a facilities requirement on those carriers. The Supreme Court's recent decision reinforced this view, by confirming the FCC's authority to allow competitors to provide local phone service relying solely on the elements in an incumbent's network. AT&T Corp. at 25. Therefore, any Bell Atlantic UNE provisioning proposal must not impose a facilities requirement.

This Order is structured as follows. First, we will summarize Bell Atlantic's proposal in this case. Then, we will summarize and evaluate the alternative proposals offered by the CLECs. We will evaluate the CLEC proposals for compliance with the technical feasibility requirement of Section 251(c)(3); and, if found technically feasible, we will evaluate whether they are likely to better accomplish the goals of the Act by enhancing competition in the local exchange market (see Briefing Question; Phase 4-E Order at 13-15). We will then evaluate them for consistency with the Phase 4-E Order. We will evaluate individual Bell Atlantic methods for interconnection in light of CLEC recommendations. Finally, we will evaluate Bell Atlantic's proposal as a whole to determine whether it is consistent with the Act⁽⁹⁾ and our Phase 4-E Order.

III. BELL ATLANTIC PROPOSALS

Bell Atlantic filed a three-part proposal that, it asserts, provides the CLECs with opportunities to use and combine UNEs that go far beyond the requirements of the Act⁽¹⁰⁾ (Bell Atlantic Brief at 5). Bell Atlantic's first proposal is to offer two combined UNE options.⁽¹¹⁾ The first combination, called the switch sub-platform, would provide a CLEC with the opportunity to obtain the local switching UNE with combinations of other UNEs

that can be accessed through Bell Atlantic's shared and/or dedicated interoffice transport. CLECs that purchase the local switching UNE will have access to UNEs on the network side of the switch (e.g., access to interoffice transport, signaling, 911/E911, operator service, and directory assistance service (Bell Atlantic Brief at 7). According to Bell Atlantic, this proposal will promote facilities-based loop competition by providing switching for switchless loop competitors (*id.* at 8). The second combination, called Enhanced Extended Loop ("EEL"), would provide a CLEC with the ability to obtain a loop and transport combination. This combination would permit a CLEC to have access to loops terminated in a foreign Bell Atlantic central office in which the CLEC has a collocation facility. A CLEC wishing to use unbundled loops may have those loops delivered to a single collocation node in a LATA via EEL (Bell Atlantic Brief at 2, 6-12).

The second proposal offered by Bell Atlantic is an expansion in the type of collocation arrangements available to CLECs, which, Bell Atlantic states will make the collocation option less expensive for CLECs. Under one such arrangement, Bell Atlantic will offer virtual collocation⁽¹²⁾ in every central office, not just those in which space does not permit physical collocation. Bell Atlantic states that there is readily available equipment that can be used in a virtual collocation arrangement that will give a CLEC the ability to combine loop and local switching UNEs remotely.⁽¹³⁾ Beyond the virtual collocation option, Bell Atlantic will offer CLECs substantially smaller collocation cage sizes (25 square feet) than those currently offered; it will provide cageless collocation within the secured collocation area;⁽¹⁴⁾ and it will permit a carrier to share physical collocation space with another carrier (Bell Atlantic Brief at 2, 12-16).

The third proposal offered by Bell Atlantic is to move beyond traditional collocation and employ an "assembly room" concept. In an assembly room, Bell Atlantic will establish UNE interface frames in secured space, separated from Bell Atlantic equipment.⁽¹⁵⁾ Here, a CLEC could cross-connect the loop and local switching UNEs itself, including making such connections in advance of individual service requests. This arrangement, says Bell Atlantic, would offer to CLECs individual loop and local switching UNEs in substantially the same manner as Bell Atlantic obtains access within its central office to its own loops and switch port facilities (Bell Atlantic Brief at 3, 16-17).

IV. AT&T PROPOSAL

A. Description

Beyond repeating its previously stated arguments for the UNE-platform, AT&T proposes that the "recent change" capabilities of Bell Atlantic's operation support systems ("OSSs") should be employed to permit CLECs to electronically combine UNEs.⁽¹⁶⁾ AT&T describes the "recent change" process as the automated process that ILECs routinely use today to separate, recombine, and modify elements such as the loop, switching, and transport, to serve their customers. AT&T asserts that this method would be less costly and risky than methods that involve collocation (AT&T Brief at 16-17).

AT&T argues that access to UNEs through "recent change" is technically feasible. AT&T states that it is similar to the access currently provided to Centrex customers so that those customers can make changes on their lines via a remote terminal. Such changes include connection and disconnection of lines, and addition, deletion, and alteration of features. AT&T asserts that, with modifications that are "modest and technically feasible," such systems could be used to provide CLECs with comparable access to combine, for example, loops and switches⁽¹⁷⁾ (AT&T Brief at 17-18; AT&T Reply Brief at 13-14).

AT&T argues further that the Eighth Circuit's language with regard to combinations of UNEs should be viewed as permitting the kind of electronic combinations it proposes. According to AT&T, the "recent change" process, if properly implemented, would satisfy both the Eighth Circuit's mandate that CLECs be enabled to combine UNEs and the Act's directive requiring nondiscriminatory access to network elements. AT&T asserts that ILECs connect and disconnect elements logically rather than physically; thus, CLECs should be given the same opportunity. Thus, AT&T argues that logical separation and recombination is the only method of accessing UNEs that fully satisfies the standard of Section 251(c)(3) of the Act, which requires that access to such elements be made available on terms that are reasonable and nondiscriminatory (AT&T Brief at 18-23).

B. Evaluation of Technical Feasibility

Both MCI and Bell Atlantic argue that the "recent change" approach offered by AT&T is not technically feasible. MCI states that the concept is under development and is not currently available for the purpose of combining elements. MCI states, too, that there is little information regarding how much it will cost to develop, test, and implement the relevant OSS for this purpose. Further, notes MCI, the "recent change" capability only works when there is dial tone on the line (MCI Brief at 20).

Bell Atlantic also asserts that the "recent change" approach proposed by AT&T is nothing more than an abstract concept. Developing this concept, Bell Atlantic says, would likely require years of effort and many millions of dollars, without an assurance that the approach would actually work (Bell Atlantic Brief at 26). Bell Atlantic argues that AT&T has failed to provide any information about overall design and system integration, new systems and system interfaces, and required modification to existing systems and existing interfaces. The only evidence supporting the technical feasibility of the product, says Bell Atlantic, is a brochure describing what may be possible given extensive development work (Bell Atlantic Brief at 27). The actual time, effort, and money required to bring this approach to fruition, argues Bell Atlantic, is immense⁽¹⁸⁾ (Bell Atlantic Brief at 27-28; Bell Atlantic Reply Brief at 18 n.12). Bell Atlantic also notes that the effort would require a financial and logistical commitment by the CLECs, that, it states, is not assured (Bell Atlantic Brief at 29).

Based on a review of the record in this case, we find that there is insufficient support on this record to establish that the "recent change" approach suggested by AT&T is technically feasible, at least in a time frame that would be appropriate for the issue at hand.⁽¹⁹⁾ The strongest evidence offered by AT&T is its witness' second-hand assertion

that one vendor has stated that a system could be put in place in "no more than six months' time and for no more than \$3 million" (Tr. 34, at 15). Beyond that assertion, no technical support has been offered for the proposal. Even the "glossy brochure" referred to by Bell Atlantic is not in evidence (Tr. 40, at 48). We would expect that, were such a capability closer to commercial development, a witness or technical documentation would have been submitted in its support. Absent such information, we cannot reach a finding that such a system could be designed and installed within a meaningful timeframe. Mr. Albert has offered a litany of tasks that would have to be accomplished to institute this capability in the OSS (Tr. 40, at 107-112). While we are cognizant that such testimony may also be reflective of Bell Atlantic's lack of interest in pursuing this approach, it nonetheless remains uncontroverted. AT&T's attempt to draw a parallel with the move-and-change capability provided to Centrex customers does not strongly support its overall case. The Centrex system is provided to a limited number of customers under an environment quite different from that which would be experienced by the churn of thousands of customers each day across the state (see also Tr. 33, at 21-22). Therefore, the Department finds that AT&T's "recent change" proposal is not technically feasible.

In light of this conclusion concerning technical feasibility, we need not move further to determine if the "recent change" approach has been demonstrated to enhance competition in the local exchange market. We turn now to MCI's proposals.

V. MCI PROPOSALS

Beyond repeating its previously stated arguments for the UNE-platform, MCI proposes that Bell Atlantic be required to combine UNEs in a variety of combinations for CLECs, subject to appropriate nonrecurring charges. For example, MCI states that Bell Atlantic should be ordered to offer, in addition to a total combination of elements (a UNE-platform or UNE-P), a loop and transport combination; a loop/digital loop carrier/transport combination; and a loop/switching combination (MCI Brief at 26-34). MCI also makes a number of suggestions with regard to the specific terms of Bell Atlantic's proposals, which we discuss in Section VI, below.

No party has argued that MCI's proposals are not technically feasible, but Bell Atlantic has argued that they are inconsistent with the Phase 4-E Order. Indeed, Bell Atlantic asserts that MCI's desire to have the Department order the combinations it has requested is simply a plea to reverse the Phase 4-E Order (Bell Atlantic Reply Brief at 19). We agree. As discussed above, the Department will not order combinations of UNEs that are not currently combined, and that any proposal for UNE provisioning cannot involve such mandated combinations. See Section II, above. Pursuant to the Supreme Court's AT&T Corp. decision, the Eighth Circuit decision, and our Phase 4-J Order, Bell Atlantic is obligated to provide existing combined UNEs, including the UNE platform, to all CLECs in their combined form, but is not required to combine UNEs which are not currently combined. Phase 4-J Order at 9-10. However, MCI's case for various combinations, to the extent that its request goes beyond existing combined UNEs, is simply a restatement of its arguments in the previous portion of the case, and we will not reconsider that Order based on MCI's reiteration.

VI. EVALUATION OF BELL ATLANTIC'S PROPOSALS

We have found that neither AT&T nor MCI have offered alternatives to Bell Atlantic's proposals that are both technically feasible and consistent with federal law and the Phase 4-E Order. We now turn to Bell Atlantic's proposals. We recognize that Bell Atlantic's proposals are, in the eyes of the CLECs, insufficient to meet their interpretation of the Act.⁽²⁰⁾ It is difficult to tell, however, whether those parties -- given the conclusions we have reached above -- would actually prefer that the Bell Atlantic alternatives not be offered. For purposes of this section, we must presume that the CLECs would not object to the expansion of alternatives offered by Bell Atlantic.

Therefore, in this section, we will take on two tasks. First, where a CLEC has made a specific suggestion to modify one of the Bell Atlantic proposals, we will evaluate that suggestion. Second, we will review the totality of the Bell Atlantic proposals to determine if they are sufficient to meet the requirements of the Act and our Phase 4-E Order.

A. Virtual Collocation

MCI argues that the Con-X equipment that Bell Atlantic proposes to use for performing combinations through virtual collocation has not been tested for this purpose (MCI Brief at 10). It also notes that the equipment is very expensive, \$20,000 per Con-X robot (not including installation) which handles only 1400 pairs (MCI Brief at 11; MCI Reply Brief at 4). AT&T echoes MCI's concerns with Bell Atlantic's proposal, and states that such equipment is fundamentally incompatible with modern network design and that this proposal is a step back, not forward (AT&T Reply Brief at 11).

Bell Atlantic asserts that its point was to demonstrate that the equipment is available, complies with industry standards, and will permit CLECs to perform remote cross-connections of loops and local switching UNEs in a virtual collocation arrangement (Bell Atlantic Brief at 16).

We find that Bell Atlantic has sufficiently demonstrated that there is robot technology available that can perform combinations in a virtual collocation setting. However, we agree with MCI that the proposed method is time-consuming, expensive, and relies on the type of electromechanical equipment from which the industry has been fleeing for the past three decades. The price of \$20,000 (plus installation) for each robot that serves 1400 pairs will often make the virtual collocation option uneconomic compared to physical collocation. See Bell Atlantic Collocation Pricing Compliance Filing dated June 25, 1998, approved March 11, 1999. While we will permit Bell Atlantic to offer optional virtual collocation in those settings in which there is space for physical collocation, we must question the efficacy of doing so in the vast majority of cases, and we are therefore dubious as to the value of this offering in promoting competition in the local exchange market.

B. Enhanced Extended Loop

MCI expresses concern that Bell Atlantic will encumber its EEL proposal with extraneous and non-cost based charges (MCI Brief at 14). Bell Atlantic counters by stating that the rates Bell Atlantic proposes for EEL service will be subject to the Department's review and approval (Bell Atlantic Brief at 10). We agree. Thus, Bell Atlantic will have to justify its rates properly, and MCI will have an ample opportunity to address the rates in that forum, including any proposed glue fees for combinations that are not currently combined.

MCI also states that Bell Atlantic has inappropriately placed restrictions on the use of EEL (MCI Brief at 13-19; MCI Reply Brief at 6-12; MCI February 9, 1999 Comments at 7). Specifically, MCI states that Bell Atlantic's proposal fails to offer CLECs the ability to concentrate loops onto interoffice transport; that the use of EEL is restricted to switched access service; that Bell Atlantic restricts conversion of some current services to EEL arrangements; and Bell Atlantic refuses to provide EEL with asynchronous digital subscriber line ("ADSL") compatible loops (MCI Brief at 14-19). MCI further states that Bell Atlantic currently combines loops and transport to provide special access service, and therefore EEL should be provided pursuant to Rule 315(b) (MCI February 18, 1999 Comments at 7).

Bell Atlantic replies that because it is making EEL available as a voluntary offering, it is not compelled to offer the full set of options under this service that might be desired by any particular carrier. In addition, in response to MCI's request for certain concentration equipment, Bell Atlantic states that it does not use that equipment in its own network and MCI has no right to demand that Bell Atlantic deploy equipment not otherwise used in its network (Bell Atlantic Brief at 14).⁽²¹⁾ Bell Atlantic disputes MCI's claim that EEL is a combination of elements that are currently combined in its network, and Bell Atlantic concludes that it is under no obligation to provide this combination to CLECs (Bell Atlantic February 18, 1999 Comments at 5). Further, Bell Atlantic notes that technical points raised by MCI on brief regarding ADSL loops were never raised during the hearing and that there are, in fact, technical reasons as to why this type of service should not be offered (Bell Atlantic Reply Brief at 13-15).

As a matter of process, Bell Atlantic is correct that the technical issues MCI raises on brief regarding ADSL do not have a sufficient evidentiary record to counter Bell Atlantic's service specifications. On the more general point, we agree, too, with Bell Atlantic that, in the absence of information that a specific service offering is discriminatory, the Company's voluntary offering of that service should not be amended. Thus, we decline to adopt MCI's proposed amendments. As above, we are cognizant that some of the terms and conditions proposed by Bell Atlantic may limit the usefulness of EEL to the CLECs. We agree, however, with MCI that EEL is "not a bad idea" (MCI Brief at 12), and we therefore anticipate that it will add value in promoting competition in the local exchange market.

C. Overall Evaluation

1. Technical Feasibility; Ability to Enhance Competition

As noted above, we are hampered in our overall evaluation of Bell Atlantic's proposals by the fact that the CLECs have often framed their objections to these proposals either (1) in a restatement of the arguments for the UNE-platform or (2) in an all-or-nothing form of argument for their particular service requests. The evidentiary record that would tend to shed light on the extent of benefits from the Bell Atlantic proposals tends to be that offered mainly by Bell Atlantic. No party argued that Bell Atlantic's proposals were not technically feasible. Not surprisingly, the Company has attested to the degree of compromise it has offered on this issue and, likewise, the degree to which its proposals will enhance competition in the Massachusetts local exchange market.

Our review of the Bell Atlantic proposals is somewhat less generous, but still positive. We view the availability of multiple alternatives as positive for competition. Bell Atlantic's proposals for an assembly room and for cageless collocation, shared collocation space, and smaller cages are all steps in the right direction in that they should tend to reduce the cost of collocation in Massachusetts. As noted above, however, its proposal for virtual collocation does not appear to offer that benefit.

Likewise, the EEL proposal also appears to offer some advantages to the development of competition, although, as noted above, we are unsure of how the restrictions placed on the service will affect its value to individual CLECs. There has been virtually no comment on the switch sub-platform, which would provide a CLEC with the opportunity to obtain the local switching UNE with combinations of other UNEs that can be accessed through Bell Atlantic's shared and/or dedicated interoffice transport. We infer from this silence that there are no serious objections to the proposal and that it might offer some value to the development of competition.

Thus, we conclude that Bell Atlantic's proposals are technically feasible, and may offer some value in enhancing competition in Massachusetts.

2. Consistency with the Phase 4-E Order

As we stated above, our Phase 4-E Order required that any proposal for UNE provisioning (1) must not involve mandated combinations of network elements that are not currently combined, and (2) must not impose a facilities requirement (see Section II).

Regarding the requirement that no proposal for UNE provisioning for "uncombined" UNEs involve mandated recombinations, Bell Atlantic certainly does not suggest that the Department order any sort of UNE combination. Although Bell Atlantic's proposal includes several voluntary recombinations,⁽²²⁾ the Company has vehemently opposed Department-mandated recombinations of UNEs. In its comments on the effect of the Supreme Court decision on this proceeding, Bell Atlantic continues to claim that it is under no obligation to combine elements that are not already combined in its network (Bell Atlantic February 18, 1999 Comments at 5). Therefore, Bell Atlantic's proposal easily meets the requirement that UNE proposals do not involve mandated combinations of uncombined UNEs.

Regarding a facilities requirement, according to Bell Atlantic, the plain language of the Act expressly contemplates that competing carriers will have to own at least some equipment of their own in order to obtain access to the UNEs that they can combine themselves (Bell Atlantic Brief at 19).⁽²³⁾

The CLECs argue that Bell Atlantic's proposals all require collocation. MCI calls Bell Atlantic's proposals nothing more than "warmed over remakes of its primary physical collocation position" (MCI Brief at 5). According to AT&T, Bell Atlantic continues to adhere to the core policy of requiring CLECs to purchase some form of collocation from Bell Atlantic, and collocation requires a CLEC to own or control a portion of a telecommunications network (AT&T Brief at 7-8, 13). AT&T argues that the Act allows CLECs to collocate in Bell Atlantic central offices, but that the Act does not require collocation, nor does it sanction imposition of a mandatory collocation requirement by ILECs (AT&T Reply Brief at 4). AT&T asserts that insisting on collocation is in contravention of the Eighth Circuit's decision⁽²⁴⁾ and FCC rules (*id.* at 13, 16, *citing* 120 F.3d at 814).

Bell Atlantic does not refute the fact that collocation poses a facilities requirement but argues that the Act contemplates such a requirement. We have said before that collocation places a facilities requirement on CLECs, and that that requirement appears to be at odds with the Eighth Circuit Decision.⁽²⁵⁾ 120 F.3d at 814. In addition, the Supreme Court upheld the FCC's rules which do not require CLECs to own facilities before gaining access to UNEs. *AT&T Corp.* at 25.

The FCC also commented on collocation and its use in combining UNEs in reviewing a Section 271 petition from BellSouth to provide interLATA service in Louisiana.⁽²⁶⁾ The FCC found that "BellSouth's offering in Louisiana of collocation as the sole method for combining unbundled network elements is inconsistent with section 251(c)(3). Competitive carriers are entitled to request any other "technically feasible" methods of gaining access to and combining unbundled network elements ..." *BellSouth Louisiana Order* at ¶ 168. The FCC found that "[a]n incumbent LEC can not limit a competitive carrier's choice to collocation as the only method for gaining access to and recombining network elements." *Id.* at ¶ 170.⁽²⁷⁾ The FCC also stated that "[b]ecause collocation requires competitors to provide their own equipment, it appears that BellSouth's collocation requirement may be inconsistent with the Eighth Circuit decision ..." *Id.* Finally, the Supreme Court affirmed the FCC's authority to determine that CLECs do not need to provide their own equipment in order to acquire UNEs from an incumbent. *AT&T Corp.* at 25.

The Supreme Court, the Eighth Circuit, and the FCC have all supported the notion that nothing in Section 251(c)(3) requires a carrier to own a portion of the network before purchasing UNEs. In addition, the Department has previously warned Bell Atlantic that it must develop an additional, alternative or supplemental method for provisioning UNEs in such a way that they can be combined by competing carriers without imposing a facilities requirement on those carriers. Bell Atlantic has failed to heed this warning. It is unrefuted that Bell Atlantic's proposed collocation requirement does not allow competing carriers to

combine UNEs that previously were not combined absent deployment of their own facilities. While Bell Atlantic's addition of collocation options is an improvement for CLECs, and we allow these options to go into effect, the proposal as a whole is inadequate to satisfy our requirements. Therefore, the Department finds that Bell Atlantic's proposal to provision UNEs solely through collocation is not consistent with federal law and the Department's Phase 4-E Order. Accordingly, the Department denies Bell Atlantic's request for approval of its April 17, 1998 UNE provisioning proposal for UNEs that were not previously combined as being in compliance with Section 251(c)(3).

We remain concerned about many of the points raised in the Phase 4-E Order. We are disappointed that after months of discovery, hearings, and briefing, we are no further along than we were when we issued our March 13, 1998 Order, at least in terms of provisioning UNEs that were not previously combined. In essence, we are in a situation of stalemate. We can not approve Bell Atlantic's proposal because it imposes a facilities requirement in the form of collocation, in direct contravention of the Eighth Circuit's findings, and the Supreme Court decision upholding the FCC's authority to preclude a facilities requirement, but no other party has proposed a viable option short of mandating combinations, which we also will not approve. Therefore, we direct Bell Atlantic to come up with an additional, alternative or supplemental method for provisioning previously uncombined UNEs in such a way that permits combination by competing carriers, but without imposing a facilities requirement, to be filed no later than four weeks from the date of this Order.⁽²⁸⁾ Again we suggest that Bell Atlantic consider providing combinations of previously uncombined UNEs, perhaps with a glue charge applicable only to combinations of previously uncombined UNEs. We also continue to note that resolution of this issues is and has to be a precondition for Bell Atlantic to receive a favorable ruling on a Section 271 filing.

3. Additional Considerations About Collocation

Because the Department finds that Bell Atlantic's proposal contains a facilities requirement which is inconsistent with the Eighth Circuit's findings and the Department's Phase 4-E Order, and denies Bell Atlantic's request for approval on that basis, we do not need to evaluate further the proposal to determine its compliance with Section 251(c)(3) of the Act. However, certain additional observations about collocation as the sole method for provisioning UNEs are in order.

The CLECs argue that Bell Atlantic's proposal to require collocation fails to comply with Section 251(c)(3) because it is discriminatory and does not provide quality of service equal to that which Bell Atlantic provides its own customers. AT&T asserts that none of the alternatives proposed by Bell Atlantic constitute adequate or sufficient means by which competing carriers will have access to Bell Atlantic's network in a nondiscriminatory manner (AT&T Brief at 16). AT&T further argues that because ILECs routinely use means other than collocation to separate and combine elements of their networks, the FCC's rules upheld by the Eighth Circuit require ILECs to provide competitors the ability to combine network elements just as the ILECs do (AT&T Brief at 19). MCI argues that Bell Atlantic's collocation proposal is "unnecessary, costly, time

consuming, inefficient, service degrading, and discriminatory" (MCI Brief at 5). Specifically, MCI argues that the collocation proposal requires additional cross-connects which represent additional points of failure (id. at 8-9). Finally, MCI argues that because Bell Atlantic has not provided CLECs with a non-discriminatory efficient means of accessing and combining the loop and transport or a complete combination of UNEs, Bell Atlantic must provide all forms of UNE combinations to CLECs (MCI February 18, 1999 Comments at 9).

Bell Atlantic disputes the claims made by the CLECs, and argues that collocation provides the capability for a carrier to access individual UNEs in a way that is technically and operationally compatible to how Bell Atlantic provides the facilities to itself (Bell Atlantic Brief at 12). Bell Atlantic further argues that the CLECs' contention that collocation arrangements degrade service is wrong and "has not been supported with even a shred of evidence" (id. at 20). Bell Atlantic states that it provides access to the individual UNEs that is equal in quality to how Bell Atlantic itself accesses comparable facilities (id. at 10). In response to allegations of discrimination, Bell Atlantic argues that it and the CLECs are positioned in fundamentally different ways and that distinctions reasonably based on these differences do not run afoul of a nondiscrimination obligation (Bell Atlantic Reply Brief at 8).

Section 251(c)(3) requires nondiscriminatory access to network elements. The quality of access to UNEs that Bell Atlantic provides to the CLECs must be in parity with the quality of access it provides to itself. If that quality is not comparable, Bell Atlantic must prove that parity is not technically feasible. ⁽²⁹⁾ 47 C.F.R. § 51.311(b).

Regarding degradation of service quality, neither Bell Atlantic nor the CLECs provided substantial evidence, other than claims that the other is wrong, regarding the effect of collocation on service quality. Bell Atlantic's proposal, which relies on manual processes and human intervention, appears to advocate a retreat from automation of the telecommunications network. Bell Atlantic's position has the potential, through degradation of service quality, to adversely affect not only competitors, but also the consumers in this state.

Regarding the discrimination argument, no one has argued that Bell Atlantic's proposal fails to provide equal access between all carriers requesting access to UNEs. The CLECs argue that the discrimination is between themselves and Bell Atlantic. Bell Atlantic argues that any distinctions here are reasonable. Bell Atlantic has failed to convince us that its requirement that CLECs provide UNE-based service only through the types of arrangements proposed here is reasonable or that Bell Atlantic gives CLECs access to UNEs which is compatible to the access it provides itself. Bell Atlantic's proposal as the only option appears discriminatory, which is contradictory to the Act and our goals.

Bell Atlantic has not convinced us that its proposal meets the standards of the Act, mainly that the access to UNEs and rates, terms and conditions of that access (1) is nondiscriminatory; (2) provided in a manner which allows competing carriers to combine those UNEs; (3) equal in quality to that which the ILEC provides to itself; and (4)

pursuant to terms and conditions which are no less favorable than the terms and conditions which the ILEC provides the UNEs to itself. 47 U.S.C. §§ 251(c)(3), 252(d)(1). Bell Atlantic's proposal offers some additional options for CLECs to enter the local market,⁽³⁰⁾ but, as a whole, Bell Atlantic's proposal does not go far enough to meet the requirements of Section 251(c)(3) .

VII. ORDER

Accordingly, after hearing and due consideration, it is

ORDERED: That Bell Atlantic be allowed to offer additional collocation options in its April 17, 1998 proposal; and it is

FURTHER ORDERED: That Bell Atlantic's April 17, 1998 proposal to provision UNEs solely through collocation is not in compliance with Section 251(c)(3) and is hereby denied; and it is

FURTHER ORDERED: That the proposals of AT&T and MCI are hereby denied; and it is

FURTHER ORDERED: That Bell Atlantic file with the Department within 28 days from the date of this Order a UNE provisioning plan that incorporates the directives herein; and it is

FURTHER ORDERED: That Bell Atlantic incorporate the directives herein into its Tariff No. 17, to be filed with the Department 21 days from the date of this Order.

By Order of the Department,

Janet Gail Besser, Chair

James Connelly, Commissioner

W. Robert Keating, Commissioner

Paul B. Vasington, Commissioner

Eugene J. Sullivan, Jr., Commissioner

1. Since the start of these arbitrations, AT&T acquired Teleport, and MCI WorldCom acquired Brooks. AT&T assumed representation for Teleport and MCI WorldCom assumed representation for Brooks. Thus, the remaining parties are Bell Atlantic, AT&T, MCI WorldCom, and Sprint.

2. UNEs are parts of the telephone network that one carrier leases from another carrier to provide telecommunications services. See 47 U.S.C. § 251(c)(3).

3. On April 30, 1998, the Department issued an Order denying MCI's Motion for Reconsideration and Petition to Open an Investigation. Consolidated Arbitrations, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94-Phase 4-F (1998).

4. Iowa Utilities Board , et al., Petitioners v. Federal Communications Commission; United States of America, Respondent, 120 F. 3d 753 (8th Cir., July 18, 1997, as amended on rehearing on October 14, 1997) (1997). The Eighth Circuit Court vacated, inter alia, the FCC's rule requiring ILECs, rather than the requesting carriers, to recombine network elements that are purchased by the requesting carrier on an unbundled basis. Id. at 813. The Eighth Circuit found that these rules could not "be squared with the terms of subsection 251(c)(3)." Id.

5. In addition, the Arbitrator ruled on an evidentiary issue at a hearing on August 20, 1998.

6. Letter from Edward D. Young, III, General Counsel, Bell Atlantic Corporation to Lawrence Strickling, Chief of the FCC's Common Carrier Bureau, dated February 8, 1999.

7. Moreover, one of the requirements of the Section 271 checklist is that Bell Atlantic provide CLECs with "[n]ondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)." 47 U.S.C. § 271(c)(2)(B)(ii).

8. With regard to combining UNEs, the Eighth Circuit Court stated that "section 251(c)(3) requires an incumbent LEC to provide access to the elements of its network only on an unbundled (as opposed to combined) basis." 120 F.3d at 813-814. The Court also said "we believe that the plain language of subsection 251(c)(3) indicates that a requesting carrier may achieve the capability to provide telecommunications services completely through access to the unbundled elements of an [ILEC's] network. Nothing in this subsection requires a competing carrier to own or control some portion of a telecommunications network before being able to purchase unbundled elements." Id. at 814. In our Phase 4-E Order, the Department stated that in light of the Eighth Circuit Decision and ensuing debate, we declined to challenge the Eighth Circuit conclusion by requiring Bell Atlantic to recombine UNEs in the exact manner prescribed by the FCC and proscribed by the Court. Phase 4-E Order at 10-11.

9. Bell Atlantic shoulders the burden to prove to the Department that it is meeting the obligations of Section 251(c)(3). The FCC rules require that where an ILEC denies a request for a particular method of obtaining interconnection or access to UNEs on the incumbent's network, the ILEC must prove that the method of obtaining interconnection or the access to UNEs at that point is not technically feasible. See 47 U.S.C. § 51.321(d). Although we first test the alternative proposals for technical feasibility and ability to enhance competition, Bell Atlantic retains the burden to prove that its proposal, taken in its entirety, meets the requirements of Section 251(c)(3).

10. Bell Atlantic filed its three part proposal on April 17, 1998 (Exh. BA-Combo-2). In its comments on the effect of the Supreme Court decision on this proceeding, Bell Atlantic stated that it still intends to provide the arrangements described in its April 17, 1998 proposal (Bell Atlantic February 9, 1999 Comments at 4).

11. Bell Atlantic proposes to offer these combinations for a period of three years (Bell Atlantic Brief at 6, 9). In addition, Bell Atlantic proposes to charge a "glue fee" for combining UNEs (id. at 7, 9).

12. In a virtual collocation arrangement, the CLEC designates the equipment to be placed at the ILEC's premises, and the ILEC is responsible for installing, maintaining, and repairing the CLEC's equipment. Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, First Report and Order and Further Notice of Proposed Rulemaking, FCC 99-48 at ¶ 19 n.27, adopted March 18, 1999 ("Deployment of Wireline Services").

13. Bell Atlantic presented Bryan Kennedy of CON-X Corporation to testify about remotely controlled cross connection equipment manufactured by CON-X. Each device would allow a CLEC to combine 1400 loops with 1400 switching ports (Bell Atlantic Brief at 15).

14. See Covad/Bell Atlantic Interconnection Agreement, D.T.E. 98-21 (1998).

15. According to Bell Atlantic, the assembly room option is less expensive because conditioned space is not required, and CLECs would not be required to install cages in the assembly room (Bell Atlantic Brief at 17).

16. AT&T states that the "recent change" capabilities of the switch disconnect the functionality of the loop, and can be used to suspend, disconnect, or reconnect a customer's service (Tr. 34, at 14-15). According to Bell Atlantic, the "recent change" capability activates and deactivates the switching service, and works only when the loop is physically connected to the switch (Tr. 33, at 21, 170).

17. AT&T asserts that modifications costing \$3 million and taking six months time could be made to Bell Atlantic's system to allow CLECs to use "recent change" capabilities (AT&T Brief at 18 n.5). AT&T proposes that if Bell Atlantic can not modify "recent change" to meet the CLECs' needs, the Department should establish a mandatory collaborative process for developing appropriate software interfaces to allow CLECs to access "recent change" (AT&T Reply Brief at 14).

18. Mr. Albert testified that large-scale software development and systems integration by Bell Atlantic and Bellcore would include: modifications to the operation of Bell Atlantic's existing legacy operations systems; development of new systems for Bell Atlantic; development of new systems for the CLECs; development of multiple new interfaces to Bell Atlantic's existing legacy operations systems; and modifications to interfaces between Bell Atlantic's existing legacy operations systems (Bell Atlantic Brief at 27-28).

19. Because of our finding here, we need not address AT&T's argument supporting logical unbundling, and Bell Atlantic's response that the Act requires physical unbundling. We note that an electronic method for obtaining and combining network

elements, or a comparable substitute, may become essential for mass market competition. See Opinion and Order Concerning Methods for Network Element Recombination, Opinion No. 98-18 (New York Public Service Commission, November 23, 1998). We encourage Bell Atlantic to begin discussion with interested parties of electronic interface alternatives, in anticipation of its Section 271 filing.

20. Regarding the proposals not specifically addressed in this section, the switch subplatform, the various collocation enhancements, and the assembly room option, AT&T and MCI did not offer comments on these particular proposals, other than to emphasize that these options do not accomplish a combination of UNE loops and switch ports without collocation, which the CLECs contend is an inadequate solution (see AT&T Brief at 8-10; MCI Brief at 5-12, 20).

21. MCI argues that the FCC recently affirmed the principle that Bell Atlantic may not limit new entrants to the technology that Bell Atlantic chooses to deploy or to using such equipment only in the same fashion that Bell Atlantic does (MCI Reply Brief at 11, citing Petition of Bell Atlantic Corporation for Relief from Barriers to Deployment of Advanced Telecommunications Services, CC Docket No. 98-11, Memorandum, Opinion, & Order & Notice of Proposed Rulemaking, FCC 98-188, adopted August 6, 1998).

22. According to Bell Atlantic, Congress intended to foreclose the option which would allow the CLECs to obtain what is basically resale service through a UNE platform, at UNE-based rates (Bell Atlantic Reply Brief at 4). However, Bell Atlantic has voluntarily offered a UNE platform in other states. Apparently, Bell Atlantic believes that Congress did not foreclose resale service at UNE-based rates through an ILEC's voluntary offering of UNE-P.

23. Bell Atlantic provides no citation for this proposition. In its comments on the effect of the Supreme Court decision on this proceeding, Bell Atlantic did not discuss any change in its position on this point.

24. AT&T asserts that Bell Atlantic is barred by the Act from limiting the method by which CLECs may access UNEs to any method which would force CLECs to purchase some portion of the local exchange network (AT&T Reply Brief at 7).

25. The Department has stated that "we believe, based on the record in this case, that Bell Atlantic's chosen method of provisioning UNEs solely through collocation may not be adequate to meet the Act's UNE provisioning requirements in subsection 251(c)(3)." Phase 4-E Order at 13. We stated that we believe that Bell Atlantic's insistence on collocation as the only answer to the UNE question very well may not meet the Act's Section 251 interconnection requirements as they relate to the provisioning of UNEs, and, consequently, that Bell Atlantic might not meet the requirements of Section 271 interconnection "checklist." Id. at 14.

26. Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in

Louisiana, CC Docket No. 98-121, Memorandum Opinion and Order, FCC 98-217, adopted October 13, 1998 ("BellSouth Louisiana Order").

27. See also Application of BellSouth Corporation, et al., Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in South Carolina, CC Docket No. 97-208, Memorandum Opinion and Order, FCC 97-418, released December 24, 1997.

28. We note that in an order adopted March 18, 1999, the FCC set out minimum requirements for collocation. Deployment of Wireline Services at ¶¶ 19-60. In its compliance filing, Bell Atlantic shall include provisions which comply with this FCC order.

29. In the Local Competition Order, the FCC stated that "we conclude that the phrase 'nondiscriminatory access' in section 251(c)(3) means at least two things: first, the quality of an unbundled network element that an [ILEC] provides, as well as the access provided to that element, must be equal between all carriers requesting access to that element; second, where technically feasible, the access and unbundled network element provided by an [ILEC] must be at least equal-in-quality to that which the [ILEC] provides to itself." Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, FCC 96-325, released August 8, 1996 ("Local Competition Order") ¶ 312. FCC rules which address the quality of the UNEs and access to UNEs provided by ILECs require that "to the extent technically feasible, the quality of an unbundled network element, as well as the quality of the access to such unbundled network element, that an [ILEC] provides to a requesting telecommunications carrier shall be at least equal in quality to that which the [ILEC] provides to itself." 47 U.S.C. § 51.311(b).

30. CLECs now have more options available to them since the FCC ordered ILECs to offer "cageless" collocation. Deployment of Wireline Services at ¶ 42.